Supreme Court, U.S.
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No. 92-946

IN THE

Supreme Court of the United States

October Term 1992

OSCAR LEE WILKINS,
Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of Florida, First District

BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED FOR REVIEW

May a trial court direct a verdict in favor of the defendant in a suit brought under the Federal Employers' Liability Act, Section 51, Title 45, United States Code?

PARTIES

1. Oscar Lee Wilkins, Petitioner.

2. Burlington Northern Railroad Company, Respondent.

CORPORATIONS RELATED TO RESPONDENT

Burlington Northern Inc. is the parent company of Respondent Burlington Northern Railroad Company. The partially owned subsidiaries of Respondent Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Longview Switching Company
M T Properties, Inc.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
TTX Company
The Wichita Union Terminal Railway Company

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CITATION OF OPINION BELOW

Neither the final judgment of the trial court nor the opinion of the District Court of Appeal of Florida, First District, has been officially published. Therefore there is no citation for either of them.

GROUND FOR JURISDICTION

The only possible basis for jurisdiction in this court on writ of certiorari would be that found in Rule 10.1(b) or (c) of the rules of this court. This court does not have jurisdiction because the state court has not decided a federal question in a way that conflicts with the decision of another state court of

last resort or of a United States court of appeals, nor has a state court decided an important question of federal law which has not been settled by this court, nor has it decided a federal question in a way that conflicts with applicable decisions of this court..

STATUTORY PROVISION

This action was brought under the provisions of the Federal Employers' Liability Act, Sections 51-60, Title 45, United States Code.

STATEMENT OF THE CASE

Respondent disagrees with the statement of the facts contained in petitioner's brief. The facts revealed by the record are as follows.

Oscar Lee Wilkins was employed as a machinist by Burlington Northern Railroad Company. He bid for a position at the railroad's yard in Pensacola, Florida, and was awarded that position because of his seniority. His duties included performing maintenance work on diesel electric locomotives, including fueling them. His next superior in his craft was located in Birmingham, Alabama, but he was under the general supervision of the lead carman in the Pensacola yard, even though the carman was in a different craft and seniority group.

In the area in which Wilkins worked there was a storage tank of diesel fuel. A system of pumps, valves and hoses permitted the tank to be supplied with fuel from a railroad tank car or a tank trailer. There was a hose that could be used to pump diesel fuel from a railroad tank car into the storage tank, but it was not used because the fuel always came in by truck rather than by rail tank car.

There was a large pipe that ran from the storage tank into a pump. That pump was used to deliver fuel to the service track on which locomotives would be located for maintenance and fueling.

There was also a small auxiliary hose that permitted removal of fuel from the storage tank to supply other machinery. That hose was designed for gravity flow, although a pump could be used to increase pressure.

The pump and valves that could be used to direct the flow of fuel were located inside a building to which Wilkins had access. Wilkins had not been told to make any adjustments in the valves because his job involved only the removal of fuel from the storage tank. A change in the valves would be required only in the event that fuel was delivered by a railroad tank car, a condition that never occurred.

The pump and valve system was not maintained by Wilkins. It fell within the jurisdiction of a water service mechanic, Charles Smith.

On the day that Wilkins claimed to have been injured, he was instructed by the lead carman to provide some diesel fuel to a brush cutter being operated by another railroad employee. Wilkins said that in response to a request by that employee to make the fuel flow faster, he attempted to turn one or more of the valves in the pump house. He said that one of the valves was extremely difficult to turn, and that in the process of applying force to the valve the center pin about which it turned broke, causing him to start to fall backwards. Although he did not fall to the floor, he said that he injured his low back.

Charles Smith, the mechanic whose duties included maintenance of the pump and valve system, testified as to its operation. His testimony was not contradicted. Smith said that

after he learned that Wilkins was claiming to have been injured, he examined the valve in question. He found that the pin going through the top of the valve to which the handle was attached was broken. He said that in order to turn the valve, it was necessary to remove a positioning pin from a ratchet by squeezing the handle. The normal travel of the valve is 180 degrees. The open and closed positions of the valve were indicated by information stamped into the top of the valve stem.

When he made his inspection after the reported injury, Smith said that he found that the positioning pin was bent to the point that it would not go into the ratchet, the spring that set that pin was no longer working and the center pin was broken.

The function of the valve that Wilkins said he broke was to permit the pumping of diesel fuel from a railroad tank car into the storage tank. In order to perform that operation, it was necessary to close that valve. At all other times the valve would be open.

Wilkins could have reached his supervisor in Birmingham by telephone. If he had a question about the operation of the pumping system, his supervisor would have referred him to Smith. Wilkins did not attempt to consult with anybody when he decided to try to make the fuel flow faster.

At the conclusion of the plaintiff's case and again after all evidence had been presented at trial, Burlington moved for a directed verdict. The trial court took those motions under advisement and submitted the case to the jury. After the jury returned a verdict for Wilkins, the trial court received written and oral argument on the motion for directed verdict. It granted the motion and entered judgment for Burlington. Wilkins took an appeal to the District Court of Appeal of Florida, First District, which affirmed the judgment without writing an opinion. Wilkins filed a petition for rehearing that

was denied. He thereby exhausted his appellate remedies in Florida.

In the final judgment (petitioner's appendix A) the court recognized the rule that it is not necessary for a plaintiff bringing suit under the Federal Employers' Liability Act to establish that negligence on the part of the railroad was the proximate cause of the employee's injury. The court recognized the fact that the employee's burden is only to establish that negligence of the employer played any part, however small, in the injury. However, the court pointed out that the undisputed evidence at trial was that Wilkins had not been instructed by any supervisor to use the method that he was using, that Wilkins was aware of the appropriate method and that there was no reason for any supervisory personnel to expect Wilkins to attempt to turn the valve in question. Therefore, there was no evidence from which a reasonable jury could conclude that negligence of the railroad played a part in causing injury to Wilkins. The court concluded that the railroad's motions for directed verdict should have been granted.

SUMMARY OF THE ARGUMENT

There is no conflict between the decision in the state court and the decision of any other court, state or federal. It is not the function of this court to decide cases that affect only the parties to a particular case. The state courts applied the proper rule of law as exemplified by *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957) and *Inman v. Baltimore & Ohio Railroad Co.*, 361 U.S. 138 (1959).

ARGUMENT

The petition for writ of certiorari should be denied. There is no conflict between the state court decision in this case and a decision from another state court of last resort, a United States court of appeals or this court for two reasons. In the first place, there is no published opinion that can be used as precedent. Secondly, the order of the trial judge shows that the state court has followed the precedents of this court in this case.

Under Florida procedure, the decision of the District Court of Appeal of Florida, First District, is not subject to review by the Florida Supreme Court since it merely affirms the trial court's judgment without opinion. The ruling of the district court of appeal is therefore that of the state court of last resort. Since all the ruling says is, "Affirmed," it cannot possibly be in conflict with any other decision.

The order of the trial court recognizes the rule of *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), which holds that under the Federal Employers' Liability Act proximate causation is not required. The railroad employee need prove only that negligence of the employer played a part, no matter how small, in the injury. The trial court also recognized the fact that the employee still has the burden of producing evidence from which a jury can lawfully conclude that the employer's negligence played a part in causing the injury. The trial court recognized the fact that one aspect of negligence is that it is reasonably foreseeable that injury will occur from the condition or conduct in question.

The trial court pointed to the fact that the undisputed evidence was that no supervisory employee of the plaintiff had instructed him to use the method that he was attempting to use to increase the flow of fuel through the supply hose. The

employee's supervisor testified that he never touched the valve that the plaintiff was attempting to turn when he sustained his injury. The mechanic who installed and maintained the pumping system testified that the valves that the plaintiff had turned and was turning at the time of his injury had no effect on the flow of fuel through the small hose. The trial court properly concluded on this undisputed evidence that there was no reason for the railroad to expect the plaintiff to attempt to turn the valve in question. Therefore there was no duty on the part of the railroad to instruct the plaintiff not to attempt to turn that valve.

Although directed verdicts may be rare in FELA cases, a directed verdict was appropriate in this case. Even after *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), this court has approved the action of a trial court in granting a motion for summary judgment. *Inman v. Baltimore & Ohio Railroad Co.*, 361 U.S. 138 (1959). As this court pointed out in that case (361 U.S. at 140):

> The burden of proving that the crossing was an unsafe place to work was on petitioner. It depended on some type of testimony showing the hazards at the crossing. There is no evidence of complaint to the railroad, nor is there other testimony of similar occurrences in the record. In making the judicial appraisal of this tenuous proof, Ohio's Court of Appeals held it not sufficient. It found that there was "no evidence of prior occurrences of the kind here under consideration" in the record. Indeed, unless these 11 words of the witness can be said with reason to be sufficient, there is none. Under such circumstances, they are too slender a reed for us to say that the decision of Ohio's court is erroneous.

The only principle of law involved in the decision of the state court of last resort in this case is that in appropriate circumstances a directed verdict may be granted for the employer in an FELA case. That decision does not conflict with the decision of any other state court of last resort, of a United States court of appeals or of this court. If this court should grant the petition for writ of certiorari, it would be violating its principle set out in such cases as *Rice v. Sioux City Memorial Parks Cemetery*, 349 U.S. 70 (1955) that this court does not decide cases that affect only the immediate litigants. The petition for writ of certiorari should be denied.

CONCLUSION

This case does not fit within any of the reasons set forth in Rule 10 of this court for the granting of a writ of certiorari. The decision of the state court of last resort that petitioner seeks to have reviewed is not in conflict with the decision of any other state court of last resort, a United States court of appeals or this court. Petitioner contends that this court should take jurisdiction of this case because the facts as he sees them do not support the trial court's action in granting the railroad's motion for directed verdict. That is not the function of a writ of certiorari in this court. The petition should be denied.

Respectfully submitted,

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